ORIGINAL

No. 96-6867

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOSEPH ROGER O'DELL, III

Petitioner

v.

J. D. NETHERLAND, WARDEN, et al.

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review the Fourth Circuit's conclusion that the rule in Simmons v. South Carolina may not be applied retroactively to O'Dell's collateral case even though all the circuit courts and state supreme courts that have addressed the issue agree with the Fourth Circuit that the law at the time O'Dell's case became final did not "compel" the rule in Simmons?

2. Should certiorari be granted to review the court of appeals' routine, fact-specific conclusion that the firmly established "actual innocence" standard has not been satisfied in O'Dell's case?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In his previous petition for a writ of certiorari, filed after his state habeas corpus review, O'Dell deliberately withheld crucial evidence demonstrating his guilt of capital murder: his own experts had matched DNA found on his jacket to DNA from his murder victim. O'Dell thus grossly misrepresented the facts of his case in that petition and three members of this Court expressed their opinion that there were serious questions about O'Dell's guilt. See O'Dell v. Thompson, 502 U.S. 995, 999 (1991) (Blackmun, J., joined by Stevens and O'Connor, J.J.). Once the truth was revealed in the subsequent federal habeas proceedings, however, all thirteen judges of the Fourth Circuit Court of Appeals agreed that O'Dell had not shown "actual innocence."

A majority of the Fourth Circuit also rejected O'Dell's claim that this Court's decision in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994), should be applied retroactively to his 1988 case. The court carefully analyzed the law from this Court existing in 1988 and properly concluded that a reasonable jurist could have decided that it was permissible for a State to prohibit jury instruction on its parole law.

STATEMENT OF THE CASE

Joseph O'Dell brutally murdered Helen Schartner during the commission of a rape in Virginia Beach, Virginia. At the time of the murder, O'Dell was on parole from sentences received in Florida for the kidnapping and robbery of a woman he had viciously attacked under circumstances similar to the later Virginia murder. He was tried by a jury in the Circuit Court of the City of Virginia Beach, convicted of capital murder and sentenced to death on November 13, 1986.

On January 15, 1988, the Supreme Court of Virginia affirmed O'Dell's convictions and sentence of death. O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491 (1988). This Court then denied O'Dell's first certiorari petition. O'Dell v. Virginia, 488 U.S. 871 (1988).

O'Dell filed a habeas corpus petition in the Circuit Court of the City of Virginia Beach in June of 1989. On October 23, 1990, an evidentiary hearing was held and on November 26, 1990, the Circuit Court entered a final order denying the petition. O'Dell filed a notice of appeal to the Virginia Supreme Court, but by order of April 1, 1991, that Court dismissed the appeal because O'Dell did not file a timely petition for appeal. On December 2, 1991, this Court denied O'Dell's second certiorari petition. O'Dell v. Thompson, 502 U.S. 995 (1991).

O'Dell filed a habeas petition in the United States District Court for the Eastern District of Virginia on July 14, 1992. Over two years later, on August 2, 1994, an evidentiary hearing was conducted. On September 6, 1994, the district court, after dismissing most of O'Dell's claims, vacated his death sentence on the basis of a recent decision from this Court and ruled that the trial court improperly had refused to allow O'Dell to inform the jury that he would be parole ineligible if sentenced to life imprisonment.

The Warden appealed to the United States Court of Appeals for the Fourth Circuit and, on September 10, 1996, the Fourth Circuit, sitting en banc[1], reversed the district court's grant of habeas relief. O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). The Court of Appeals held that O'Dell's claim concerning his parole ineligibility did not warrant relief because the application of Simmons v. South Carolina to his case would constitute an impermissible "new

[1] The case was heard en banc on the Fourth Circuit's own motion, without first having been heard by a panel.

rule." O'Dell, 95 F.3d at 1238-1239. On O'Dell's cross-appeal, the Fourth Circuit ruled that the district court correctly had determined that O'Dell had not established "actual innocence" so as to overcome his defaulted claims. Indeed, ***all thirteen Fourth Circuit judges*** agreed that O'Dell had not "come even close" to satisfying the applicable standard. Id. at 1250; see also id. at 1255-1256 (Ervin J., concurring "in those portions of the majority opinion...denying O'Dell relief from his conviction").

On November 19, 1996, O'Dell applied to the Fourth Circuit for a stay of execution and the Warden opposed the motion. The Court of Appeals has not yet ruled on the application. O'Dell's execution is scheduled for December 18, 1996.

STATEMENT OF FACTS

The Supreme Court of Virginia summarized the evidence surrounding the murder and rape as follows:

> On Tuesday, February 5, 1985, the victim, Helen Schartner, left a night club in Virginia Beach known as the County Line Lounge about 11:30 p.m. O'Dell left the same club sometime between 11:30 p.m. and 11:45 p.m. The next day, February 6, 1985, Schartner's car was found in the parking lot of the County Line Lounge. Near 3:00 p.m. the same day, Schartner's body was discovered among the reeds in a field near a muddy area behind another club, across the highway from the County Line Lounge. Tracks from tires consistent with the tires on O'Dell's car were discovered in an area near Schartner's body.
>
> Schartner had been killed by manual strangulation. She also had eight separate wounds on her head caused by blows from a handgun equipped with a cylinder. These head wounds produced extensive bleeding. A handgun with a cylinder was seen in O'Dell's car about 10 days prior to the murder.
>
> Not more than two and a half hours after Schartner left the County Line Lounge, O'Dell entered a convenience store with blood on his face and hands, in his hair, and down the front of his clothes.
>
> Vaginal and anal swabs disclosed the presence of seminal fluid in the victim's vagina and anus containing enzymes consistent with those in O'Dell's seminal fluid.
>
> O'Dell had been living in the home of a woman friend, Connie Craig. Approximately a week before the murder, Craig ordered O'Dell from the premises. O'Dell called Craig about 7:00 a.m. on Wednesday, the morning after the murder, said that he had vomited blood all over his clothes,* and stated that he wanted to talk with her before he left for Florida.
>
> When O'Dell reached Craig's house at about 7:30 a.m., he said he wanted to sleep, and he slept until 9:30 or 10:00 o'clock that evening. When O'Dell awakened, he asked Craig how to remove the blood from his new blue-gray jacket.
>
> The next day, Thursday, about 1:00 p.m., O'Dell called Craig from his place of work and told her he had put his clothes in her garage, but he intended to take them out the following day. After the telephone conversation, Craig read the local newspaper's account of the murder of Schartner. The account said the victim had last been seen at the County Line Lounge. When Craig remembered that O'Dell customarily visited the County Line Lounge on Tuesday nights, "something clicked." Craig went to her garage and found a paper bag containing four pieces of bloody clothing, including a pair of jeans which also had mud on them. Craig brought these clothes into the house and called the police.
>
> Forensic evidence established that the dried blood on two of O'Dell's articles of clothing was the same type as Schartner's in each of the 11 blood classification systems analyzed. Only three out of a thousand persons are in this blood classification. O'Dell's blood was not the same type as Schartner's. O'Dell's car was later seized and searched, and dried blood found on objects in the car also had several enzyme markers consistent with Schartner's blood, but not O'Dell's.

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* In an alibi inconsistent with the one he had given to Craig, O'Dell told the police the blood came from a nose bleed caused by being struck while attempting to stop a fight at another club on the night of February 5. [Footnote in original opinion].

> During his incarceration, O'Dell told Steven Watson, a fellow inmate, he had strangled Schartner after she refused to have sexual intercourse with him.

O'Dell, 234 Va. at 679-681, 364 S.E.2d at 495-496. The state court's recitation of the historical facts is binding on this Court. See 28 U.S.C. § 2254(e)(1); see also former § 2254(d); Sumner v. Mata, 449 U.S. 539, 545-547 (1981) (statutory presumption of correctness applies to state appellate court's findings of historical fact).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THERE IS NO COMPELLING REASON TO REVIEW THE FOURTH CIRCUIT'S DECISION THAT SIMMONS IS A "NEW RULE."

The "compelling" reasons which support this Court's extraordinary exercise of its certiorari power are not present in this case: there is no conflict among the circuit courts; the Fourth Circuit's decision did not depart "from the accepted and usual course of judicial proceedings" or conflict with this Court's precedents; nor was the issue decided below "an important question" that should be settled by this Court. See Sup. Ct. R. 10.

A. The Courts of Appeals are unanimous.

The few circuit courts which have addressed the issue of whether the rule in Simmons v. South Carolina is retroactively applicable on federal collateral review, all have agreed with the Fourth Circuit that it is not. See Stewart v. Lane, 70 F.3d 955, 958, n.3 (7th Cir. 1995), cert. denied, 116 S.Ct. 2580 (1996); Johnson v. Scott, 68 F.3d 106, 111-112, n.11 (5th Cir. 1995), cert. denied, 116 S.Ct. 1358 (1996).[2] Given this unanimity, O'Dell's case presents no compelling reason to grant, or issue to resolve on, certiorari. See Sup. Ct. R. 10.[3]

Moreover, given the total absence of conflict among the courts of appeals, as well as the small number of circuits that even have had occasion to consider the issue, it would be premature to grant review on this issue at this time. "'The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.'" California v. Carney, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting), quoting Estreicher & Sexton, A Management Theory of the Supreme Court's Responsibilities: An

[2] Every state court that has addressed the issue also has found the "Simmons" rule inapplicable to cases which predated Simmons. See Mueller v. Murray, 252 Va. ___, ___ S.E.2d ___, 1996 Va. LEXIS 97 (Nov. 1, 1996) (applying this Court's "new rule" analysis to "Simmons" claim); Commonwealth v. Christy, 656 A.2d 877, 888-889 (Pa.) (same), cert. denied, 116 S.Ct. 194 (1995).

[3] O'Dell makes much of the fact that six of the thirteen judges of the Fourth Circuit dissented from the court's judgment that Simmons is a new rule. The internal split in the Fourth Circuit, however, is not the type of "split" among circuit courts that compels a grant of certiorari. See Sup.Ct.R. 10. Indeed, the Fourth Circuit only took this case en banc to ensure that the case received the "careful consideration" three members of this Court believed it was due. See O'Dell, 95 F.3d at 1218. O'Dell's "internal split" argument is a smokescreen to obscure the fact that a majority ***seven*** judges of the Fourth Circuit ruled against him on this issue and the fact that it is the majority that speaks for the Court of Appeals, just as it does for this Court. O'Dell's phantom "split" argument, therefore, cannot alter the fact that the Fourth Circuit's ruling is in agreement with the other circuits which have addressed the issue, and it only highlights the point that, in 1988, reasonable jurists could have disagreed over the question of whether a "Simmons" rule was dictated by precedent. See Butler v. McKellar, 494 U.S. 407, 415 (1990) (if outcome susceptible to debate then prohibited as "new rule"); Sawyer v. Smith, 497 U.S. 227, 234 (1990) (same).

Empirical Study, 59 N.Y.U.L.Rev. 677, 719 (1984).[4]

B. The retroactivity issue can affect only a small number of cases.

This Court noted in Simmons that "[o]nly two States other than South Carolina" had a sentencing system in 1994 that could be affected by its rule. See Simmons, 114 S.Ct. at 2196 n.8. This Court should not grant certiorari where, as here, the retroactivity issue can affect not only a small, finite number of cases, but a number that is certain to ***decrease*** with the passage of time.[5] See California v. Ramos, 463 U.S. 992, 1029-1031 (1983) (Stevens, J., dissenting) (certiorari should not be granted where decision can affect only California's death penalty procedures).

Moreover, as of April 24, 1996, the standard for reviewing claims brought in § 2254

[4] O'Dell points to two federal district court decisions which, he says, show a "conflict." These decisions, however, do not constitute grounds for granting certiorari. First, as lower level decisions, they cannot qualify as the final word from their respective circuits. See Sup.Ct.R. 10. Their opinions, in fact, make the case for denying certiorari on an issue that still is "percolating." Second, one of the cases, Spreitzer v. Peters, 1996 U.S.Dist. LEXIS 1189 (N.D. Ill. Feb. 5, 1996), is contrary to its own circuit precedent. See Stewart v. Lane, 70 F.3d 955, 958 n.3 (7th Cir. 1995), cert. denied, 116 S.Ct. 2580 (1996). And neither district court opinion even ***mentions*** the fact that authority from this Court existed at the time the criminal cases became final which was ***contrary*** to the rule later embraced in Simmons.

[5] O'Dell's attempt to pin his case to this Court's grant of certiorari in Lambrix v. Singletary should be rejected. In Lambrix, the Florida Supreme Court had approved a procedure by which an aggravating factor, invalid under Maynard v. Cartwright, 486 U.S. 356 (1988), nevertheless could be weighed by the sentencer. Lambrix, 72 F.3d 1500, 1503 (11th Cir. 1996). Despite the fact that this Court already had ruled in Espinosa v. Florida, 505 U.S. 1079 (1992), that such a procedure was impermissible under the Eighth Amendment, ***and already had ruled in Stringer v. Black, 503 U.S. 222 (1992), that Maynard was not a new rule and could be applied retroactively,*** the Eleventh Circuit held that Espinosa was a new rule and thereby inapplicable. 72 F.3d at 1503. Thus, it is at least arguable that the Eleventh Circuit's decision in Lambrix is directly contrary to what this Court already had held in Stringer. Obviously, O'Dell's case is different because this Court has not found it necessary to speak on the retroactivity of Simmons and the circuit courts which have addressed the issue all agree with the Fourth Circuit that it is not retroactive on collateral review.

proceedings is governed by the new provisions of the 1996 Antiterrorism and Effective Death Penalty Act. See Felker v. Turpin, 116 S.Ct. 2333 (1996). Pursuant to new § 2254(d), a federal court may not grant collateral relief on a claim that was adjudicated on its merits in state court unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Congress' implementation of a statute which governs what law applies to claims which were reviewed on their merits in state court thus limits any impact of the Fourth Circuit's decision in this case to O'Dell alone. In other words, this Court should not grant certiorari to elucidate an area of the law -- the "new rule" doctrine -- that is now a matter of statutory law.[6]

C. The Fourth Circuit's faithful application of the Caspari test presents no important issue for review.

The Fourth Circuit's analysis of the retroactivity issue in O'Dell is a straightforward application of this Court's settled standard. In Caspari v. Bohlen, 510 U.S. 383 (1994), the Court set out a three-part test to determine whether a case announced a new rule, and the Fourth Circuit painstakingly followed that test: the Court determined that O'Dell's case became final in 1988 and then "surveyed the legal landscape" in 1988. O'Dell, 95 F.3d at 1224 et seq. That survey entailed a meticulous analysis of whether a reasonable jurist in 1988 would have

[6] It is the Warden's position that new § 2254(d) applies to O'Dell's case and that he is not entitled to relief under either the old law or the new.

concluded that the rule announced in 1994 in Simmons was compelled.[7] A majority of the en banc Fourth Circuit concluded that "Simmons was the paradigmatic 'new rule,'" see 93 F.3d at 1218, and that the new rule did not qualify under either of the two extraordinary exceptions outlined in Caspari. See id. at 1238. There is nothing unsettled, unusual or unreasonable about the Fourth Circuit's application of Caspari's test.

Neither of the two cases upon which Simmons principally relied articulated the "Simmons" rule. In Gardner v. Florida, 430 U.S. 349 (1977), the Court held that reliance upon secret ***factual*** information in sentencing a defendant to death violates the Eighth Amendment, although not necessarily due process. Gardner, 430 U.S. at 364 (White, J., concurring); see Marks, 430 U.S. at 193. In Skipper v. South Carolina, 476 U.S. 1, 5 (1986), the Court held, under the Eighth Amendment, that ***factual*** evidence that the defendant would not pose a danger if given a life sentence -- in Skipper's case, his record of good behavior -- may not be excluded from the sentencer's consideration. To hold that either of these cases "compelled" the Simmons due process rule, especially when the rights identified in them were based upon the exclusion of evidence of a ***factual*** rather than a ***legal*** nature and primarily rested upon an Eighth Amendment analysis, would vitiate the "new rule" doctrine altogether. See Gray v. Netherland, 116 S.Ct. 2074, 2084 (1996) ("the new-rule doctrine 'would be meaningless if applied at this

[7] The Simmons rule comes from Justice O'Connor's concurrence: "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury -- by either argument or instruction -- that he is parole ineligible." 114 S.E.2d at 2201 (O'Connor, J., concurring); see Marks v. United States, 430 U.S. 188, 193 (1977) (holding of case is position taken by concurrence on narrowest grounds); see also Simmons, 114 S.Ct. at 2193, n.4 (The rule is based exclusively on the Due Process Clause of the Fourteenth Amendment, the Court having expressly declined to decide whether the rule was required by the Eighth Amendment).

level of generality.'"), quoting Sawyer, 497 U.S. at 236.

The Fourth Circuit correctly concluded that, even if a reasonable jurist in 1988 would have felt that Gardner and Skipper supported the due process rule announced later in Simmons, this Court's decision in California v. Ramos, 463 U.S. 992 (1983), was diametrically opposed to such a conclusion.[8] In Ramos, the Court held that there was no Eighth Amendment or due process violation where a State chose to instruct the sentencing jury that the Governor could commute a sentence of life without parole but ***not*** to instruct that the Governor could also commute a death sentence. Id. at 1010-1011. The very argument later ***accepted*** in Simmons -- that an uninstructed jury was left with the misimpression that it must render a death sentence to keep the prisoner from returning to society -- ***expressly was rejected*** in Ramos, 463 U.S. at 1010-1011, in favor of a broad principle of deference to a State's decision as to what information it would give juries about matters of pardon and parole. Id. at 1013-1014 ("the wisdom of the decision to permit juror consideration of possible commutation is best left to the States").[9] In fact, Ramos expressly ***approved*** of the practice that many States like Virginia had

[8] Skipper was decided after Ramos but did not mention, much less overrule, it. Indeed, Justice O'Connor expressly distinguished the error in Simmons -- disallowing instruction on state's parole law -- from the error in Skipper -- disallowing facts to rebut future dangerousness. See Simmons, 114 S.Ct. at 2200 (O'Connor, J., concurring).

[9] In addition to the Ramos decision, the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), which had restated the principle that States can choose whether to instruct juries on post-conviction procedures, still was valid law at the time O'Dell's case became final in 1988. See 472 U.S. at 342 (O'Connor, J., concurring); see also Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 2010 (1994) (Justice O'Connor's opinion in Caldwell is "controlling").

of prohibiting the presentation of pardon and parole information to juries. Id. at 1013 n.30.[10]

In 1988, ***no authority anywhere*** had held it a constitutional violation for a State to prohibit the disclosure of parole information to juries. Not until Simmons did such a rule exist. Of course, as the Fourth Circuit observed, Virginia's pre-Simmons rule against the disclosure of parole information quite reasonably had relied on Ramos for its validity. See, e.g., Mueller v. Commonwealth, 244 Va. 386, 409, 422 S.E.2d 380, 394 (1992), cert. denied, 507 U.S. 1043 (1993); Peterson v. Murray, 904 F.2d 882, 886-887 (4th Cir.) (agreeing with Virginia Supreme Court), cert. denied, 498 U.S. 992 (1990). The Fifth Circuit also agreed with this conclusion. See Knox v. Collins, 928 F.2d 657, 660 (5th Cir. 1991).

It simply cannot be said that the decisions of the Virginia Supreme Court, the Fourth Circuit and the Fifth Circuit were "objectively unreasonable," see Stringer v. Black, 503 U.S. at 237, given this Court's express approval of the rule against disclosure of parole information found in Ramos, and the lack of a contrary ruling in any other case in 1988. O'Dell's detailed discussion of the issue (Pet. at 9-15) completely misses the point. Indeed, instead of an analysis of what a reasonable jurist could have decided in 1988, the petitioner advances nothing more than an argument for the adoption of the "Simmons" rule. That battle, however, already has been fought and decided. The Fourth Circuit's thorough and meticulous application of this Court's settled retroactivity standard to the relevant issue of whether O'Dell may receive the benefit of a rule which did not exist in 1988, simply presents no compelling reason to grant

[10] As the Fourth Circuit noted, 95 F.3d at 1227-1228, the ***entire*** Court in Ramos agreed on this principle of deference, as is evidenced by the fact that the dissenting opinions were based upon the belief that the Constitution ***forbade altogether*** any mention to juries of pardon or parole matters. See 463 U.S. at 1021-1023 (Marshall, J., dissenting); id., at 1028-1029 (Blackmun, J., dissenting); id. at 1029-1031 (Stevens, J., dissenting).

certiorari.

D. Certiorari should not be granted merely to decide whether the "Simmons" new rule satisfies an exception under Teague.

O'Dell tacitly concedes that the "Simmons" new rule does not satisfy Teague's first exception that would allow its retroactive application: O'Dell is subject to imprisonment and punishment for capital murder regardless of whether he was entitled to an instruction on Virginia's parole law. See Caspari, 114 S.Ct. at 956. The new rule, therefore, does not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Id., quoting Teague v. Lane, 489 U.S. 288, 307 (1989).

O'Dell's weak attempt, moreover, to place his case within the second exception for "watershed rules of criminal procedure," see Teague, 489 U.S. at 311, cannot constitute the kind of compelling reason this Court requires to review a case. O'Dell denigrates the Fourth Circuit's conclusion that the new rule in Simmons is not "on par with the rule announced in Gideon v. Wainwright," see O'Dell, 95 F.3d at 1239, yet, given this Court's clear restriction on the exception to rules which are "on par" with Gideon, the Fourth Circuit's analysis was precisely correct. See Gray v. Netherland, 116 S.Ct. 2074, 2085 (1996) (rule that capital defendant entitled to notice of evidence used against him to prove future dangerousness "has none of the primacy and centrality of the rule adopted in Gideon"), quoting Saffle v. Parks, 494 U.S. 484, 495 (1990).

Indeed, the "Simmons" new rule is even less "on par" with Gideon than the rule at issue in Gray. Under Simmons, there is no categorical, automatic requirement that the jury be instructed about the defendant's parole status: the new rule does not even apply unless (1) the prosecution argues in favor of a finding of "future dangerousness," (2) the defendant in fact will

be ineligible for parole and (3) ***the defendant requests that the jury be instructed.*** See Simmons, 114 S.Ct. at 2201 (O'Connor, J., concurring) (the rule entitles the defendant to be ***allowed*** to inform the jury). Certainly, the "bedrock," Gideon-like exception to the "new rule" doctrine is not met by the evidentiary, fact and procedure-dependent new rule announced in Simmons. See Graham v. Collins, 506 U.S. 461, 478 (1993) (exception for "small core of rules"); Sawyer, 497 U.S. at 242 (rule must "alter our understanding of the bedrock procedural elements"); Teague, 489 U.S. at 313 (rule would be "central to an accurate determination of innocence or guilt" and "it is unlikely that many such components of basic due process have yet to emerge").

The new rule announced in Simmons was merely an unexpected refinement of this Court's evidentiary requirements in capital sentencing. In view of the fact that this Court ***never*** has found a new rule to satisfy the "bedrock" exception, this Court should not grant certiorari merely to address whether the Fourth Circuit properly found that the Simmons rule was not a new Gideon.

E. O'Dell's parole status played no part in the jury's determination of sentence.

Certiorari also should not be granted in this case because, even if it is assumed for the sake of argument that O'Dell was entitled to a "no parole" instruction, it cannot be said that the omission had a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). First, unlike Simmons, here there is no indication that the jury considered the possibility that O'Dell would be paroled. See Simmons, 114 S.Ct. at 2192 (jurors asked whether Simmons would be eligible for parole). Indeed, O'Dell's jury only deliberated for ***one hour*** before returning its sentencing verdict. (JA 2505).

Second, as the Fourth Circuit correctly stated, the harmlessness is apparent from "the heinousness of the crime, O'Dell's lengthy and frightening criminal record,[11] and O'Dell's own testimony from the stand that he would spend the rest of his life behind bars." O'Dell, 95 F.3d at 1239, n.14.

Finally, the jury's verdict was based not only on O'Dell's unquestionable dangerousness, but also on its independent finding that O'Dell's conduct "was outrageously wanton, vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." Id. See Tuggle v. Netherland, 79 F.3d 1386, 1395 (4th Cir.) (the "Ake" error had no effect on the jury's independent finding of "vileness"), cert. denied, 117 S.Ct. 237 (1996). The record in this case simply does not permit a conclusion that the lack of a "Simmons" instruction had the "substantial and injurious effect" required by Brecht. Certiorari review certainly is inappropriate in a case where, regardless of whether a "new rule" may be applied, the rule clearly cannot lead to relief for the petitioner.

II. O'DELL'S "ACTUAL INNOCENCE" ISSUE IS NOT A BASIS FOR CERTIORARI REVIEW.

O'Dell argues that his defaulted claims should have been addressed because he allegedly is "innocent." This fact-specific issue was resolved against O'Dell ***by a unanimous en banc***

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[11] At the age of thirteen, O'Dell committed a breaking and entering. During his teen years, he committed five auto thefts, three assaults, a threatening of bodily harm and an attempted escape. As an adult, he was convicted of five armed robberies and five unauthorized uses of an automobile. In prison, he was convicted of second-degree murder. On parole, he was convicted of a kidnapping and robbery in which he had brutally attacked his victim. On parole once again, he murdered Helen Schartner. O'Dell, 95 F.3d at 1220.

Fourth Circuit Court of Appeals and certainly presents no issue meriting certiorari review.[12] See Sup.Ct. R. 10 ("certiorari is rarely granted" to review "the misapplication of a properly stated rule of law" to the particular facts of a case"); Kyles v. Whitley, 115 S.Ct. 1555, 1578 (1995) (Scalia, J., dissenting) ("an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original).

The Fourth Circuit determined the issue, moreover, only after it "painstakingly canvassed the record [and] carefully consider[ed] every claim." O'Dell, 95 F.3d at 1218, 1239-1246.[13] This determination was merely an application of settled law to highly case-specific facts. See United States v. Johnson, 268 U.S. 220, 227 (1925) (certiorari not available "to review evidence and discuss specific facts"); see also Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J., respecting the denial of certiorari) (same). Faithful to Schlup v. Delo, 115 S.Ct. 851, 867 (1995), the Fourth Circuit found that O'Dell had failed to establish that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." O'Dell, 95 F.3d at 1246-1254. Indeed, the entire en banc Court of Appeals found the "mountain

[12] The dissenting judges of the en banc Court of Appeals dissented only from the majority's analysis of the Simmons/new rule issue. The dissenters expressly ***concurred*** in the affirmance of the district court's denial of relief on the default/"innocence" claims, a denial made after a full evidentiary hearing on O'Dell's "new" evidence of "innocence." See O'Dell, 95 F.3d at 1255-1256, 1263.

[13] The reason the full Court gave such exhaustive attention to the case was because three members of this Court had expressed concern over O'Dell's guilt in their opinion respecting the denial of certiorari from state habeas review. 95 F.3d at 1218. That concern was a direct result of O'Dell's gross misrepresentation of the evidence, specifically his decision not to inform this Court that his own experts had matched DNA on his jacket to the DNA of his victim. This fact was not revealed until the federal habeas proceedings.

of circumstantial evidence"[14] compelled its conclusion:

> We do not believe it can even remotely be claimed that O'Dell has established that it is more likely than not that ***no*** reasonable juror would have convicted him. The only thing that O'Dell has demonstrated is that ***one*** of the many blood stains on his clothing did not come from either himself or Helen Schartner; that he also had someone else's blood on his shirt by no means shows that he did not murder Helen Schartner, particularly in light of the vast other evidence that he did. We therefore hold that O'Dell has not passed through the "narrow" gateway of actual innocence, and so are barred from reviewing his procedurally defaulted claims on federal ***habeas***.

Id. at 1254 (emphases in original).

In sum, the Fourth Circuit's thorough factual analysis of O'Dell's claim of innocence is not the type of decision this Court reviews on certiorari. The Court of Appeals merely applied settled precedent to the facts of this particular case and correctly concluded that O'Dell was not entitled to relief. That unanimous decision of thirteen court of appeals judges presents no

[14] The evidence was, indeed, a "mountain:" blood stains on O'Dell's two jackets, his shirt, his jeans, a cloth, a sardine can and the right and left seat backs, seat cover and rear floormat of O'Dell's car all matched the blood of the victim. 95 F.3d at 1247. Further, O'Dell was seen leaving the bar shortly after the victim left and lied about the reasons he was covered in blood after the murder. Id. at 1250-1251. The victim had been beaten with an object consistent with a gun in O'Dell's possession and tire tracks from his car were left at the scene. Id. The victim's head and pubic hairs were found in O'Dell's car and seminal fluid and sperm consistent with O'Dell's were recovered from the victim's vagina and anus. Id. at 1251-1252. O'Dell also confessed his crime to another inmate while awaiting trial. Id. at 1252. And ***O'Dell's*** own post-trial retesting of the evidence by Lifecodes, Inc. demonstrated a DNA match between the blood on his jacket and the victim's blood. Id. at 1253.

No amount of reconfiguring of the facts by O'Dell can hide the fact that his own DNA experts matched the blood on his jacket to the blood of Helen Schartner. Again, it is that critical fact that O'Dell ***deliberately withheld from this Court*** when he filed his previous certiorari petition, and that, no doubt, caused three members of this Court to express doubt about O'Dell's guilt in their opinion respecting the denial of certiorari from state habeas review. Once the truth was revealed during the federal habeas proceeding -- that both Lifecodes and the Commonwealth's expert agreed that DNA on the jacket matched the DNA of the victim --, not one of the thirteen members of the Fourth Circuit had a doubt about O'Dell's guilt.

compelling reason for review.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. D. NETHERLAND, WARDEN, et al.,
Respondents herein.

By: _____
Counsel

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Attorney General of Virginia

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[15] O'Dell misrepresents the facts throughout his petition. Indeed, he even improperly includes ***eight additional pages*** of inaccurate factual argument in his appendix. (Pet. App. Vol. II, pp. 187a - 193a). The accurate record of facts is recounted in the Fourth Circuit's opinion. One of the most flagrant examples of misrepresentation is O'Dell's reference to a ***newspaper article*** which reports that Steven Watson, a Commonwealth's witness to whom O'Dell confessed, recanted his trial testimony in "a detailed and persuasive affidavit." (Pet. at 22, 28 n. 14). O'Dell does not inform this Court that witness Watson "recanted" his trial testimony only after being harassed for several days by O'Dell's representatives. Steven Watson, however, since has reaffirmed the truth of his trial testimony to State officials, volunteered to the Commonwealth the circumstances and tactics used by O'Dell to extract the reported "recantation," and sought the assistance of the Commonwealth in fending off further harassment from O'Dell.

COMMONWEALTH of VIRGINIA

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December 3, 1996

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: O'Dell v. Netherland
No. 96-6867

Dear Mr. Suter:

Please find enclosed the original and ten copies of the Respondents' Brief in Opposition, to be filed on behalf of the respondents in the above-referenced case.

Thank you for your assistance in this matter.

Very truly yours,

Katherine P. Baldwin
Assistant Attorney General
Criminal Litigation Section

Enclosures

3:61/234

cc: Robert S. Smith, Esquire

No. 96-6867

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOSEPH ROGER O'DELL, III

Petitioner

v.

J. D. NETHERLAND, WARDEN, et al.

Respondents

RESPONDENTS' CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on December 3, 1996, I mailed, by Federal Express, a copy of the Warden's Brief in Opposition to Robert S. Smith, Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019-6064, counsel for the petitioner.

Katherine P. Baldwin
Assistant Attorney General